Attachment #1

BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re: Deseret Power Electric Cooperative	**PSD Appeal No. 07-03**

BRIEF *AMICI CURIAE* OF UTAH AND WESTERN NON-GOVERNMENTAL ORGANIZATIONS

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BRIEF *AMICI CURIAE* OF UTAH AND WESTERN NON-GOVERNMENTAL ORGANIZATIONS

STATEMENT OF INTEREST

The signatories to this brief represent thousands of members and concerned citizens in Utah and across the American West. Our organizations are united by our abiding commitment to cost-effective clean energy solutions that address the global warming crisis. We have worked with western officials, western business leaders, publicly regulated utilities, and other allies to meet the West's electricity needs with low-emitting electric generating resources.

Mom-Ease is a non-profit helping Utah's families make healthy and sustainable choices. We provide free educational services including information on the public health risks posed by air pollution caused by coal-fired power plants. We strongly believe we owe it to our children's health and economy to start focusing on cleaner and more sustainable energy sources.

Utah Physicians for a Healthy Environment is dedicated to protecting the health and well-being of the citizens of Utah by promoting science-based education and interventions that result in progressive, measurable improvements to the environment. One of our goals is that all new electric energy supplies for the state of Utah should come from renewable resources.

Wasatch Clean Air Coalition (WCAC) works on energy, air quality and climate change issues in Utah. WCAC participates in public hearings, Legislative, Air Quality Board and Public Service Commission workgroups advocating demand side management, energy efficiency and renewable energy sources as an answer to environmental and health problems.

Post Carbon Salt Lake is actively engaged in advocating clean and renewable energy solutions for our membership of approximately 200 Salt Lake City citizens. We support a complete moratorium on coal development as well as the dismantling of existing coal-fired utility plants unless the carbon dioxide can be completely sequestered. Post Carbon Salt Lake is a strong and active participant in alternatives to fossil-fuel use across the West.

For more than two decades, the Grand Canyon Trust has been engaged in controlling pollution from coal-fired power plants in the Southwest. The Trust is a committed advocate in reducing greenhouse gas emissions and preventing the ravages of climate change on the Colorado Plateau. The Trust is actively promoting efficiency and renewable energy options and policies for rapidly transitioning to a cleaner energy future in Utah and surrounding states.

The Montana Environmental Information Center (MEIC) is a member-supported advocacy and public education organization that works to protect and restore Montana's natural environment. Since its founding in 1973, MEIC has lobbied and litigated in state and federal forums to prevent degradation of air quality in Montana including from coal-fired power plants.

The Wyoming Outdoor Council has promoted clean energy solutions in the State of Wyoming for the last forty years. It advocates for the use of clean, renewable forms of energy and increased energy use efficiency, and seeks to minimize the use of coal to meet our electricity needs due to the numerous and severe environmental impacts created by the use of coal for electricity generation. The Wyoming Outdoor Council is a recognized leader in the State of Wyoming in all issues related to energy development, production, transmission, and use.

Western Resource Advocates is a nonprofit conservation organization dedicated to protecting the Interior West's land, air, water and climate.

For a quarter century, the Rocky Mountain Office of Environmental Defense has been dedicated to addressing the health and welfare effects of airborne contaminants arising from a variety of sources and activities across the intermountain West. Protecting public health and the environment from global warming pollution and finding solutions to the global warming crisis is a core organizational mission.

STATEMENT

The Intergovernmental Panel on Climate Change has determined that the "[w]arming of the climate system is unequivocal."[1] Compelled by science, western officials and electricity providers are carrying out public and private actions to reduce heat-trapping emissions. These efforts include local climate action plans to deploy comprehensive climate-friendly policies.[2] Western states are currently developing a bipartisan regional market-based trading program to cut greenhouse gas emissions from major sectors 15% over 2005 levels by 2020.[3] Western states have established carbon dioxide emission limits for new coal plants in the same way that other air pollutants have long been

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[1] Intergovernmental Panel on Climate Change, *Summary for Policymakers,* in CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS 5 (2007), *available at* http://ipcc-wgl.ucar.edu/wgl/Report/AR4WG1_Print_SPM.pdf.

[2] Local governments across the West have adopted climate action plans. See Exec. Order No. 2006-13 (AZ); Exec. Order No. S-03-05 (CA); Colorado Climate Action Plan, Nov. 5, 2007; Exec. Order No. 05-033 (NM); GOVERNOR'S ADVISORY GROUP ON GLOBAL WARMING, OREGON STRATEGY FOR GREENHOUSE GAS REDUCTIONS (2004) (OR); Exec. Order No. 07-02 (WA).

[3] Western Climate Initiative, Statement of Regional Goal (Aug. 22, 2007), *available at* http://www.westernclimateinitiative.org/WCI_Documents.cfm. The Initiative includes Arizona, California, New Mexico, Oregon, Utah, Washington, and the Canadian provinces of British Columbia and Manitoba. Western Climate Initiative, http://www.westernclimateinitiative.org/.

controlled.[4] And western utilities are pioneering new portfolios that rely expansively on energy efficiency and renewable electricity resources.[5]

EPA, by contrast, has declined to consider global warming pollution in permitting decisions for major emitting facilities under the Clean Air Act's Prevention of Significant Deterioration of Air Quality program. The narrow question presented here is whether EPA, when it is the permit issuing authority, must consider heat-trapping carbon dioxide emissions in determining the best available control technology (BACT) for new coal-fired power plants. At issue is EPA's interpretation of its own regulations governing the pollutants that must be considered in the BACT analysis. Those regulations plainly provide that BACT applies to "[a]ny pollutant that is . . . subject to regulation under the Act." 40 C.F.R. § 52.21(b)(50). Carbon dioxide has long been subject to regulation under the Act. The law could not be clearer that the BACT analysis must address this pollutant.

SUMMARY OF ARGUMENT

On April 2, 2007, the United States Supreme Court rejected EPA's claims that Congress did not intend for the Agency to regulate climate change under the federal Clean Air Act. The high Court held that greenhouse gases including "[c]arbon dioxide, methane, nitrous oxide, and hydrofluorocarbons are without a doubt" air pollutants within the scope of the Clean Air Act and that "greenhouse gases fit well within the Clean Air Act's capacious definition of 'air pollutant.'" Massachusetts v. EPA, 127 S. Ct. 1438, 1460-1462 (2007).

Despite the fact that carbon dioxide has long been subject to regulation under the Act and that EPA's own regulations instruct that BACT applies to "any" pollutant subject to regulation under the Act, EPA unveils a *deus ex machina* in attempting to avoid the consequences of the high Court's decision. But EPA's improbable arguments cannot rescue the Agency from its obligations under the law.

First, EPA claims that the regulations requiring BACT for "any" pollutant "subject to regulation under the Act" are decisively limited to air pollutants subject to regulations requiring the actual control of emissions. In this way, EPA attempts to eliminate carbon dioxide from the scope of regulated pollutants by excluding from consideration the long-standing emission monitoring requirements for carbon dioxide that apply to coal-fired electric generating units.

But this interpretation cannot be reconciled with the language before the Board. BACT applies on its face to "[a]ny pollutant that is . . . subject to regulation under the Act." 40 C.F.R. § 52.21(b)(50). The natural and ordinary use of the term "any" is encompassing. Massachusetts v. EPA, 127 S. Ct. at 1460. The operative language is straight forward in

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[4] See infra Part II (discussing recent legislation in Washington, California, and Montana).

[5] One prominent example is Xcel Energy, which recently filed a resource plan for Colorado that will add about a gigawatt of renewable energy by 2015, reduce demand by almost 700 megawatts, and reduce greenhouse gas emissions by ten percent by 2017. http://www.xcelenergy.com/XLWEB/CDA/0,3080,1-1-1_15531_46991-42162-0_0_0-0,00.html.

applying to all pollutants that are "subject to regulation" under the Act. There is no modifier. Nowhere does the regulatory text say that the pollutant must be subject to regulation for the purpose of controlling emissions.

Further, EPA's attempt to narrow its obligation to address BACT for pollutants subject to regulation under the Act, by excluding carbon dioxide because it is regulated by monitoring requirements, is unavailing. Monitoring is integral to the purposes of the statute. Not surprisingly, monitoring requirements are subject to the full enforcement protections under the Clean Air Act. 40 C.F.R. § 75.5. Indeed, the very purpose of the carbon dioxide monitoring requirements for coal plants was inextricably related to control requirements. The congressional sponsor of this provision expressly recognized that compliance with the law may require carbon dioxide reductions and therefore sought to ensure that credit was received for reductions: "What I hope to achieve with this amendment is the elimination of the possibility that U.S. utilities will reduce CO[2] emissions as a consequence of compliance with these Clean Air Act amendments and not get credit for these reductions in the future if the United States signs an international treaty on global climate change." CRS, *A Legislative History of the CAAA of 1990,* 1990 CAA Leg Hist. 2667, 2987 (comments of Mr. Moorhead).

EPA also seeks to disable the relevance of carbon dioxide in determining BACT by arguing that the long-standing monitoring requirements were adopted under the 1990 Amendments and therefore are not "subject to regulation under the Act." This novel argument rips the Clean Air Act Amendments from the fabric of the statute. This wrenching severing of the law fails if for no other reason that EPA itself deemed section 821 as part and parcel of the Clean Air Act when it adopted the monitoring requirements under 40 C.F.R. pt. 75 and has consistently interpreted other entirely similar provisions of the Amendments as establishing obligations arising under the Clean Air Act. Plainly, carbon dioxide is a pollutant subject to regulation under the Act.

The Supreme Court rejected EPA's legal arguments that attempted to categorically shunt global warming pollution outside the scope of the Clean Air Act. EPA now endeavors to nullify the high Court's decision by excluding carbon dioxide from the category of pollutants that must be considered in determining BACT, despite the expansive obligation to address BACT for *any* pollutant subject to regulation under the Act. Indeed, the BACT requirement is pointedly designed to assimilate new information about air pollutants and available technologies on a case-by-case basis in each permitting decision for major emitting facilities. There are in fact a host of available measures to reduce carbon dioxide emissions that EPA should have considered in the permitting process. EPA must consider carbon dioxide in carrying out the BACT requirement for the Bonanza power plant.

ARGUMENT

I. EPA MUST ADDRESS CARBON DIOXIDE IN DETERMINING BACT FOR THE BONANZA COAL-FIRED ELECTRIC GENERATING UNIT

A. BACT Applies to Any Pollutant Subject to Regulation Under the Clean Air Act

The unambiguous words of the Clean Air Act's PSD BACT provision and the PSD regulations leave no room for uncertainty. EPA must perform a BACT analysis and set a BACT emission limitation for carbon dioxide. Clean Air Act § 165(a), 42 U.S.C. § 7475(a); 40 C.F.R. § 52.31(a)(2)(iii). It is undisputed that carbon dioxide is a pollutant under the Clean Air Act. Massachusetts v. EPA, 127 S. Ct. at 1460. In Sections 165(a)(4) and 169(3) Congress directed EPA to conduct a BACT analysis and include a BACT emissions limitation "for *each* pollutant subject to regulation under [the Clean Air Act]" for which emissions exceed specified significance levels. Clean Air Act, §§ 165(a)(4), 169(3), 42 U.S.C. §§ 7475(a), 7479(3) (emphasis added). Indeed, EPA's own regulations implementing the PSD program provide that "[a] new major stationary source shall apply best available control technology *for each regulated NSR pollutant* that it would have the potential to emit in significant amounts." 40 C.F.R. § 52.21(j)(1) (emphasis added). Section 52.21(b)(50) defines a "regulated NSR pollutant" as including "*any* pollutant...subject to regulation under the Act." (emphasis added).

Nowhere in the statute or in the federal regulations cited above is there any indication that Congress or EPA intended to exclude carbon dioxide from the BACT analysis. To the contrary, both Congress and EPA used broad, sweeping language to refer to the class of pollutants subject to BACT analysis and emissions limitations under the PSD program. This is evident in Congress's choice of the words "*each* pollutant subject to regulation under [the Clean Air Act] and EPA's use of the phrase "*any* pollutant...subject to regulation under the Act." 42 U.S.C. § 7475(a); 40 C.F.R. §52.21(a)(2)(iii).

A long line of Supreme Court cases, as well as a recent D.C. Circuit case arising under the Clean Air Act, demonstrate the importance of modifying words such as "any" or "each" in elucidating the meaning of the phrases they modify. See, e.g., Norfolk S. Rwy. Co. v. Kirby, 543 U.S. 14, 31-32 (2004); see also Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 130-31 (2002); United States v. Gonzalez, 520 U.S. 1, 5 (1997). Importantly, in numerous instances, the courts have held that the word "any" has an expansive meaning. Massachusetts, 127 S. Ct. at 1460 (holding that the repeated use of the word "any" in the Clean Air Act's definition of "air pollutant" evinced an unambiguous intent to define "air pollutant" broadly to include carbon dioxide); State of New York v. EPA, 443 F.3d 880, 885 (D.C. Cir. 2006) ("[re]ad naturally, the word 'any' has an expansive meaning, that is 'one or some indiscriminately of whatever kind,'" quoting United States v. Gonzalez, 520 U.S. at 5).

The D.C. Circuit decision in Alabama Power Co. v. Costle, 636 F.2d 323, 403 (D.C. Cir. 1979) is particularly instructive as to Congress' intent as to the meaning of Section 165's BACT provision. Alabama Power involved a direct challenge by industry to EPA's regulations implementing the PSD program shortly after the program's creation in 1977. Industry argued that EPA's then existing regulations applying BACT "to all pollutants subject to regulation under the Act" was impermissibly broad; BACT should have applied only to sulfur dioxide and particulate matter industry asserted. Alabama Power, 636 F.2d at 406.

The D.C. Circuit summarily rejected industry's argument, relying on the plain language of the BACT provision as applying to "each pollutant subject to regulation under the Act":

> Section 165, in a litany of repetition, provides without qualification that each of its major substantive provisions shall be effective after 7 August 1977 with regard to each pollutant subject to regulation under the Act, or with regard to any "applicable emission standard or standard of performance under" the Act. As if to make the point even more clear, the definition of BACT itself in section 169 applies to each such pollutant. The statutory language leaves no room for limiting the phrase "each pollutant subject to regulation" to sulfur dioxide and particulates.

Id.

The same reasoning applies here. BACT applies to each and all pollutants subject to regulation under the Clean Air Act without limitation.

In declining to address carbon dioxide as part of the BACT requirement, EPA re-interprets the plain language of its regulation and posits that BACT applies only to pollutants "subject to a provision in the Clean Air Act or regulations promulgated by EPA that under the Act require actual control of emissions of that pollutant". EPA Region VIII's Resp. to Pet. For Review, 1. Had Congress intended the BACT requirement to encompass only air pollutants subject to specific control requirements, it would have said so explicitly. In drafting the Clean Air Act Congress knew well how to refer to provisions requiring actual control of emissions. Repeatedly throughout the statute Congress used the terms "emission(s) limitation" or "emission(s) standard" to refer to provisions requiring actual control of emissions. See, e.g., 42 U.S.C. §§ 7602(k), 7651d(a)(1), and 7617(a)(7). Indeed, the terms "emission(s) limitation" or "emission(s) standard" appear no less than 162 times throughout the Clean Air Act.

Rather than using either of the familiar "emission(s) limitation" or "emission(s) standard" terms in delineating the pollutants that BACT is required to address, Sections 165(a)(4) and 169(3) instead used the broad phrase "subject to regulation." The meaning of this phrase surely was known to the drafters of the BACT provision as it appears no less than

11 times in the Clean Air Act.[6] In fact, in Section 112(j)(5) Congress used both the phrases "subject to regulation" and "emission limitation" within the same sentence:

> [T]he permit shall be issued pursuant to title V and shall contain emission limitations for hazardous air pollutants subject to regulation under this section and emitted by the source that the Administrator or the State determines, on a case-by-case basis, to be equivalent to the limitation that would apply to such source if an emission standard had been promulgated in a timely manner under subsection (d)...

42 U.S.C. § 7412(j)(5).

The parallels to sections 165 and 169(3) are striking. In section 169(3), Congress similarly delineated the class of substances within the scope of statutory protection to include pollutants that are "subject to regulation" and then directed the Agency to establish emission limitations or standards for such pollutants. But EPA's interpretation would conflate the meaning of the two distinct phrases in section 169(3) and thereby nullify the phrase "subject to regulation." That is contrary to law.

1. Carbon Dioxide is "Regulated" Under the Act.

Section 821 of the Clean Air Act Amendments of 1990 directed EPA to promulgate regulations to require certain sources, including coal-fired power plants, to monitor carbon dioxide emissions and report monitoring data to EPA. 42 U.S.C. § 7651k note. In 1993, EPA promulgated these regulations, which are set forth at 40 C.F.R. pt. 75. The regulations generally require monitoring of carbon dioxide emissions through the installation, certification, operation and maintenance of a continuous emission monitoring system or an alternative method (40 C.F.R. §§ 75.1(b), 75.10(a)(3)); preparation and maintenance of a monitoring plan (40 C.F.R. § 75.33); maintenance of certain records (40 C.F.R. § 75.57); and reporting of certain information to EPA, including electronic quarterly reports of carbon dioxide emissions data (40 C.F.R. §§ 75.60 – 64). Section 75.5, 40 C.F.R., prohibits operation of an affected source in the absence of compliance with the substantive requirements of Part 75, and provides that a violation of any requirement of Part 75 is a violation of the Clean Air Act. Thus, carbon dioxide is currently regulated under the Acid Rain provisions of the Act.

Importantly, Congress used the same word -"regulation"-in Sections 165(a)(4), 169(3) and Section 821. Congress expressly provides that the BACT requirement applies to each pollution "subject to regulation." 42 U.S.C. §§ 7475(a)(4) & 7479(3). Section 821 in turn plainly describes the carbon dioxide monitoring requirements as "regulations." For the pollutant carbon dioxide, the law commands the Administrator to "promulgate

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[6] See, e.g., 42 U.S.C. § 112(a)(2) ("[F]or purposes of this section, the term "area source" shall not include motor vehicles or nonroad vehicles *subject to regulation* under Title II."; 42 U.S.C. § 7412(c)(3) (directing EPA to establish area rules for "categories or subcategories of area sources to ensure that area sources... that present the greatest threat to public health in the largest number of urban areas are *subject to regulation* under this section...") (emphasis added).

regulations" and states that the "regulations" shall require reporting of data to the Administrator. 42 U.S.C. § 7651k note. Thus, Congress plainly provided that carbon dioxide is subject to regulation.

Monitoring regulations, such as those set forth in 40 C.F.R. pt. 75, are fundamental pillars of the Clean Air Act and the PSD program. The purpose of the Clean Air Act is to protect human health and the environment from the dangerous effects of harmful airborne pollutants. 42 U.S.C. § 7401. The purpose of the PSD program is to protect public health and welfare from any actual *or potential* adverse effect of air pollution which the Administrator reasonably anticipates could occur. 42 U.S.C. § 7470(1) (emphasis added). Accordingly, the PSD program is designed to prevent the potential impacts of air pollution. Monitoring and recordkeeping requirements are critical to the success of the protective and preventive goals of both the Clean Air Act and the PSD program. They provide important and timely information necessary to establish sufficiently protective standards. The Supreme Court in Massachusetts v. EPA recognized the importance of collaboration and research, enabled by tools such as monitoring and reporting, for any "thoughtful regulatory effort." Massachusetts, 127 S. Ct. 1438, 1461 (2007). Indeed, like other pollutants regulated under the statute, failure to comply with the carbon dioxide regulatory requirements is deemed a violation of the Act subject to the statute's full panoply of enforcement provisions. 40 C.F.R. § 75.5. Carbon dioxide has long been subject to regulation under the Act and must be addressed in determining BACT.

2. The Monitoring Requirements Are Regulations "Under the Act".

EPA argues that the regulations requiring monitoring and reporting of CO_2 emissions are not regulations "under the Act" because Section 821 of the 1990 Clean Air Act Amendments is not part of the Act. Congress found otherwise when it adopted the 1990 Clean Air Act Amendments. The opening lines of the 1990 Clean Air Act Amendments declare that it is "An Act" "To amend the Clean Air Act...." Pub. L. No. 101-549, 104 Stat. 2399 (1990). Congress intended that all of the provisions that follow this introduction be woven into the fabric of the Clean Air Act. The public law deliberately constituted a revision to the Clean Air Act, not some ancillary or separate law.

Not surprisingly, EPA interpreted section 821 as part of the Act when it adopted the carbon dioxide regulatory requirements. EPA also conveniently overlooks the fact that several other statutory provisions, which EPA does not dispute are part of the Clean Air Act, are cited as authority for EPA's adoption of the carbon dioxide regulations. Thus, the interpretation of its regulations advanced by EPA in this proceeding cannot prevail.

In response to the Clean Air Act Amendments of 1990, EPA proposed a set of "core" regulations under the Acid Rain Program that it described as "interrelated components," including the continuous emissions monitoring regulation. See 56 Fed. Reg. 63,002 (Dec. 11, 1991). In the same proposal, EPA asserted that "section 821 *of the Act* requires all affected units in the Acid Rain program to monitor carbon dioxide (CO_2)

emissions." Id. (emphasis added). EPA continued to assert that Section 821 was part of the Clean Air Act when it adopted the final rule and this statement can still be found today in the regulation itself:

> PART 75—CONTINUOUS EMISSION MONITORING
>
> Subpart A—General
>
> § 75.1 Purpose and scope.
>
> (a) *Purpose.* The purpose of this part is to establish requirements for the monitoring, recordkeeping, and reporting of sulfur dioxide (SO2), nitrogen oxides (NOX), and carbon dioxide (CO2) emissions, volumetric flow, and opacity data from affected units under the Acid Rain Program pursuant to sections 412 and 821 of the CAA, 42 U.S.C. 7401–7671q as amended by Public Law 101–549 (November 15, 1990) [the Act].

40 C.F.R. § 75.1 (2007). The history of the CO_2 monitoring regulation demonstrates the error of EPA's argument in this proceeding—clearly the 1990 Clean Air Act Amendments are part of the Clean Air Act, as recognized even by EPA when it adopted these regulations under Section 821.

Furthermore, as is the case with many Clean Air Act regulations, EPA grounded its authority to adopt the continuous emission monitoring regulations in several different provisions of the Clean Air Act, most of which EPA does not contest are part of the Act. The CO_2 monitoring requirements are an integral part of these regulations, which EPA has itself described as "interrelated components" of the core regulations under the Acid Rain Program. The continuous emission monitoring regulations apply generally to SO_2 and NO_x along with CO_2, see 40 C.F.R. §§ 75.1 and 75.10(a) (2007), and the specific provisions for CO_2 monitoring refer back to the specific provisions for SO_2, simply replacing one term for the other, id. § 75.13(a). Part 75 of the regulations was adopted under the authority of Section 412 of the Clean Air Act as well, which EPA does not contest is part of the Act. Additionally, the regulations specifying appeal procedures applies broadly to all of the core Acid Rain Program regulations, and EPA takes its authority for these regulations from a number of Clean Air Act provisions, including both Title IV generally (the Acid Rain provisions) and Section 301.[7] See 40 C.F.R. pt. 78 (2007). In adopting the monitoring requirements at 40 C.F.R. pt. 75, EPA even defined the term "Act" to mean "the Clean Air Act, 42 U.S.C. § 7401, et seq. as amended by Public Law No. 101-549 (November 15, 1990)." 40 C.F.R. § 72.2. Thus, even were Section 821 of the Clean Air Act Amendments of 1990 not considered to be part of the Clean Air Act, the CO_2 monitoring requirement nevertheless is a regulation "under the Act" because it takes its authority from numerous provisions of the Act, including

[7] Section 301 provides general rulemaking authority for the Administrator to promulgate regulations under subchapter III of the Clean Air Act. 42 U.S.C. § 7601(a) (2006) ("[T]he Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under the chapter.")

Sections 301 and 412. Thus EPA's novel argument that the regulation of CO_2 emissions is not "under the Act" is erroneous and must fail.

Finally, EPA's interpretation of section 821 directly conflicts with the court's interpretation of other similar provisions of the acid rain program. One of the most well known examples is EPA's interpretation of the Section 404 study of acid deposition standards provided for under the 1990 Clean Air Act Amendments. Section 404 of Pub. L. No. 101-549 provided for EPA to prepare a report on the feasibility and effectiveness of an acid deposition standard. New York maintained that the Agency had failed to carry out the analysis required under the statutory provisions and filed a citizen suit to compel EPA to carry out the full statutory requirements. The reviewing court held that it had subject matter jurisdiction to review the claim regarding the section 404 requirement which it treated as a requirement of the Act: "Because the Complaint alleges that defendants' violated § 404(2) of the Act, plaintiff stated a claim upon which relief may be granted." New York v. Browner, 1998 U.S. Dist. LEXIS 5996, *5, n. 4 (April 21, 1998). Section 404, like section 821, is a requirement of the Act.

B. The Structure and Purpose of the PSD Program Requires EPA to Establish BACT Limits That Maximize Emission Reductions of Pollutants Subject to Regulation Under the Act Through Advances in Technology and Careful Decision-Making.

The PSD program is preventive in its purpose and structure. Congress declared that the PSD program is to protect public health and welfare from the "potential adverse effect" of air pollution and to "preserve, protect, and enhance" air quality in special places such as national parks. 42 U.S.C. § 7470(1), (2). The BACT provision is designed to advance these statutory purposes by protecting and enhancing air quality against any class of air pollutants "subject to regulation under the Act."

The PSD program is preventive in its structure by applying to a broad class of pollutants and applying the latest technology to reduce emissions from these contaminants. BACT requires the maximum degree of emission reduction for pollutants regulated under the Act by assimilating advances in technology through case-by-case decision making. And like many other provisions in the Clean Air Act, BACT is intended to spur innovation and investments in new technology. When Congress added the BACT provision to the 1977 Clean Air Act Amendments, it made this purpose clear. The drafters of the 1977 Amendments described BACT as "[p]ossibly the most important of the 1977 Act's many technology-fostering measures, to spur 'improvements in the technology of pollution control.'" S. Rep. No-95-127 at 17-18.

BACT's unique case-by-case approach to pollution control facilitates this core purpose. Unlike other provisions in the Clean Air Act, BACT ensures that each permitted facility is subject to the best available control technology taking into account energy, environmental and economic impacts specific to each facility. 42 U.S.C. § 7479(3). This site-specific analysis allows for flexibility in permitting decisions intended to result in the

"maximum degree of reduction" of each pollutant achievable for the facility. 42 U.S.C. § 7475(a)(4); see, e.g., State of Alaska Dep't. of Envtl. Conservation v. EPA, 124 S. Ct. 983, 1007 (2004) (affirming EPA's authority to invalidate a state PSD permit for failure to adequately explain the absence of the most stringent pollution control technology). Importantly, this aspect of BACT stands in sharp contrast to other provisions of the Act which are bound by more static determinations. For example, EPA is required to establish New Source Performance Standards requiring specific categories of new and modified sources to meet technology-based standards only once every 8 years. 42 U.S.C. § 7411(b)(1)(B). These industry-wide standards serve as the floor to a BACT emissions limitation. 42 U.S.C. § 7479(3).

The PSD program reflects Congress' overarching interest in ensuring rigorous decision-making as part of the PSD permit review process so as to carry out the preventive purpose of this program. This procedural rigor is written into the law. A core purpose of the PSD program is "to assure than any decision to permit increased air pollution in any area" is made "only after careful evaluation of all the consequences of such a decision." 42 U.S.C. § 7470. Addressing the implications of a new facility that will release millions of tons of heat-trapping greenhouse gases is consonant with the core requirements of the PSD program that provide for preventive action by applying to a broad class of pollutants regulated under the Act, the assimilation of technological advances and judicious decision making that accounts for all of the consequences of a decision to permit increased air pollution.

II. THERE ARE AVAILABLE METHODS TO LOWER CARBON DIOXIDE FROM COAL-FIRED ELECTRIC GENERATING UNITS AND WESTERN STATES HAVE PROVIDED FOR ENFORCEABLE EMISSION LIMITATIONS.

The requirement that EPA undergo a BACT analysis for the Deseret unit in no way pre-ordains an outcome. As explained above, BACT simply requires the Agency consider a full range of available pollution control technologies capable of achieving the maximum degree of reduction available.

There are several "available methods, systems and techniques" for addressing the carbon dioxide from a new coal-fired electric generating unit. For example, higher boiler efficiencies directly affect carbon dioxide emissions. Alstom, the top supplier of coal-fired boilers worldwide, exaplins that "an efficiency improvement of 1 percentage point equals 2-3% less CO_2 emitted." Alstom, *Leading the Industry in Supercritical Boiler Technology,* available at:
http://www.power.alstom.com/_eLibrary/presentation/upload_70124.pdf.
Alstom documents that pulverized coal boilers available today can operate at much higher thermal efficiencies while saving overall costs. Id. ("Plants that employ today's generation of Alstom supercritical boilers can operate at cycle efficiencies in excess of 42-45% HHV (44-47% LHV)); ("Lower fuel consumption is a direct consequence of higher efficiencies. Fuel costs are a power plant's largest operating cost item. Because

the capital cost of supercritical plants is close to those of subcritical plants, overall life cycle costs are often reduced."). EPA has recognized the potential for thermal efficiency advances to lower emissions. 70 Fed. Reg. 9706, 9713 (Feb. 28, 2005).

The use of cleaner fuels such as coal scrubbing and co-firing with biomass or natural gas can lower the carbon dioxide emissions discharged by a facility. The Department of Energy has documented over 9,000 megawatts of installed biomass capacity in the United States. The sources of biomass include forest products and agricultural residues and were fired using gasification, direct firing or co-firing.[8]

Facilities can use their waste heat through combined heat and power configurations that lower the carbon dioxide emissions. EPA has documented the climate-friendly benefits of combined heat and power.[9]

EPA has also recognized the potential to lower carbon dioxide emissions through capture of carbon dioxide and underground storage. EPA Region IX advised the Bureau of Land Management, in preparing an Environmental Impact Statement for a proposed coal plant in Nevada, to "discuss carbon capture and sequestration and other means of capture and storage of carbon dioxide as a component of the proposed alternatives." Letter from Nova Blazej, EPA Region IX to Jeffrey A. Weeks, Bureau of Land Management at 14 (June 22, 2007). Thus EPA has, in fulfilling its duties under the Clean Air Act, both recognized the potentially significant impact that CO_2 emissions from power plants can have and argued that potential control strategies should be evaluated. Conducting a BACT analysis for CO_2 would therefore only result in EPA engaging in the same type of analysis that it would have other federal agencies conduct.

Several western states establish binding carbon dioxide emission limits for coal-fired power plants. For example, in May, Washington adopted a law requiring new coal plants to meet a carbon dioxide emission limitation of 1100 pounds per megawatt-hour unless the standard is demonstrated to be infeasible. S.B. 6001, 60th Leg., 1st Reg. Sess. (Wash. 2007). California has a similar carbon dioxide emission standard in effect. S.B. 1368, 2005-06 Leg., Reg. Sess. (Cal. 2006). Montana requires facilities fueled primarily by coal to capture and sequester at least 50 percent of the carbon dioxide produced. H.B. 25, 60th Leg., Reg. Sess. (Mont. 2007).

These numerous examples of available measures and technologies to reduce carbon dioxide emissions from traditional coal-fired power plants demonstrate the fallacy in EPA's refusal to even consider the effects of CO_2 in the PSD permit process. Carbon dioxide is a pollutant subject to regulations under the Act and must be addressed in the BACT analysis. Indeed, EPA can ignore this harmful pollutant no longer.

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[8] http://www1.eere.energy.gov/biomass/electrical_power.html (last visited Oct. 8, 2007).
[9] http://www.epa.gov/chp (last visited Oct. 8, 2007).

CONCLUSION

For the foregoing reasons, we respectfully ask the Environmental Appeals Board to reverse and remand EPA's permit determination to consider carbon dioxide pollution consistent with the BACT requirement.

Respectfully submitted,

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Environmental Attorney

Vickie Patton
Deputy General Counsel
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2334 North Broadway
Boulder, Colorado 80304
(303) 440-4901

Attachment #2

BEFORE THE
ENVIRONMENTAL APPEALS BOARD
U.S. ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re:	)	
	)	**PSD Appeal No. 07-03**
Deseret Power	)	
Electric Cooperative	)	
	)	

SUPPLEMENTAL BRIEF *AMICI CURIAE* OF UTAH AND WESTERN NON-GOVERNMENTAL ORGANIZATIONS

Kevin Lynch
Environmental Defense Fund
2334 North Broadway
Boulder, CO 80304
(303) 447-7200

September 12, 2008

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BEFORE THE
ENVIRONMENTAL APPEALS BOARD
U.S. ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re:	)	
	)	**PSD Appeal No. 07-03**
Deseret Power	)	
Electric Cooperative	)	
	)	

SUPPLEMENTAL BRIEF AMICI CURIAE OF UTAH AND WESTERN NON-GOVERNMENTAL ORGANIZATIONS

The Utah and Western Non-Governmental Organizations[1] respectfully submit their response to the Board's June 16, 2008 Order requesting supplemental briefing and to the Region/OAR's filings dated August 8, 2008 and September 9, 2008.

During oral argument, the Board asked the Region/OAR whether the CO_2 monitoring requirements are "enforceable under Section 113 of the Clean Air Act." Transcript at 81. Counsel for the Region/OAR responded that "consistent with our interpretation," enforcement under the Clean Air Act "would not be appropriate." *Id.*

The Region/OAR's August 8 supplemental filing, however, retracts that position. The new filing reveals not only that it is appropriate to enforce the CO_2 monitoring provisions under the Clean Air Act, but that EPA has repeatedly done so. As the hundreds of pages submitted by EPA show, across many administrative and federal district court cases in which it has enforced the CO_2 monitoring requirements, the Agency has never relied on any enforcement authority other than the Clean Air Act. And contrary to the Region/OAR's position, the fact that the CO_2

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[1] The groups joining in this brief represent thousands of members and concerned citizens in Utah and across the American West. The groups include Utah Physicians for a Healthy Environment, Post Carbon Salt Lake, Grand Canyon Trust, Montana Environmental Information Center, Wyoming Outdoor Council, Western Resource Advocates, and the Rocky Mountain Office of Environmental Defense Fund.

monitoring requirements are enforceable under the Clean Air Act – to the tune of hundreds of thousands of dollars in civil penalties – confirms that CO_2 is "regulated under" the Act.

In addition, as the Region/OAR have acknowledged in their September 9, 2008 letter to the Board, EPA has recently published in the Federal Register a state implementation plan for Delaware that not only requires *monitoring* of CO_2, but imposes *quantitative limits* on CO_2 emissions. In other words, ***even under the too-narrow definition of "regulation" that the Region/OAR have advocated in this case, CO_2 is regulated under the Clean Air Act.*** As the EPA itself states in its Federal Register notices, it approved the Delaware SIP (and made it part of federal law) "under the Clean Air Act" (*see* 73 Fed. Reg. 11,845) and "in accordance with the Clean Air Act" (*see* 73 Fed. Reg. at 23,101). EPA has been reviewing Delaware's SIP submitted at least since November 1, 2007, when Delaware submitted the SIP revision to EPA. 73 Fed. Reg. at 11,846.

Contrary to the Region/OAR's contention, the fact that the Delaware SIP was approved in 2008, after the Region acted on Deseret's permit application, does not end the matter. Given the importance of this development, amici respectfully request that, if the Board does not impose a BACT requirement on other grounds, the Board remand this proceeding to Region 8 for reconsideration in light of the EPA's action limiting CO_2 emissions under the Clean Air Act. *See In re J&L Specialty Prods. Corp.*, 5 E.A.D. 31, 66 (EAB 1994) (Board "has the discretion to remand permit conditions for reconsideration in light of legal requirements that change" between a Region's action on a permit and the conclusion of administrative appeals).[2]

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[2] In *J&L*, the Board stated: "On administrative review, the Agency has the discretion to remand permit conditions for reconsideration in light of legal requirements that change before the permit becomes *final agency action.*" 5 E.A.D. at 66 (emphasis added). Under the applicable regulations here, "final agency action occurs when a final . . . PSD permit decision is

Finally, amici respectfully request that the Board take official notice of another Federal Register publication by EPA since the completion of substantive briefing in this proceeding.[3] Specifically, on July 30, 2008, EPA published an Advanced Notice of Proposed Rulemaking that addresses potential solutions to the policy concerns that Deseret and some amici have raised about application of Prevention of Significant Deterioration ("PSD") permitting requirements to CO_2. As this EPA notice demonstrates, the Board need not address these policy issues, to which EPA has already identified possible solutions. Instead, the EAB need only decide whether the proposed Bonanza plant – which would emit more than a million tons of CO_2 every year – is subject to PSD requirements, regardless of how EPA addresses significantly smaller emitters.

1. The Region/OAR Concede that the Carbon Dioxide Monitoring Requirement Is Enforceable Under the Clean Air Act

In their supplemental brief, the Region/OAR admit (at 19-20) that the enforcement provisions of the Clean Air Act, including Section 113 of the Act, 42 U.S.C. § 7413, can fairly be read to include authority to enforce the CO_2 monitoring provisions. In endorsing this position, the Region/OAR have abandoned the contention at oral argument that it "would not be appropriate" to use the Clean Air Act to enforce the CO_2 monitoring requirements.

As the Region/OAR acknowledge (at 19), the Clean Air Act's enforcement provision (Section 113) applies, by its terms, to violations of the Clean Air Act, but does not specifically refer to statutory provisions that are codified as a note to the Act, such as Section 821.

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issued by EPA and agency review procedures under this section are exhausted." 40 C.F.R. § 124.19(f)(1).

[3] Under settled precedent, and as the Region/OAR's September 9, 2008 filing recognizes, the Board may take official notice of documents published in the Federal Register. *E.g.*, *In re Arecibo & Aguadilla Regional Wastewater Treatment Plants*, 12 E.A.D. 97, 145 n.86 (EAB 2005) ("The Board takes official notice of relevant non-record information contained in the [pertinent] judicial proceedings .... The Board generally regards public documents of this kind as appropriate for official notice.") (citations omitted); *see also infra* note 7.

Nevertheless, as the Region/OAR admit, Congress plainly intended for the CO_2 monitoring provisions of Section 821 to be enforceable. The Region/OAR themselves therefore state that it is fair to conclude that "the authority in [Clean Air Act] § 113" was "expanded" to include enforcement of Section 821's CO_2 monitoring requirements. Region/OAR Supp. Response at 19.[4] In other words, far from it being "inappropriate" to enforce the CO2 monitoring requirement under the Clean Air Act, the Region/OAR have conceded that it is perfectly proper to do so.

The Region/OAR also discuss a different interpretation: that Section 821 creates a parallel enforcement regime, which is just like the Clean Air Act mechanism, but is somehow not part of the Clean Air Act. (Region/OAR Supp. Response at 11-19.) As discussed below, this theory is inconsistent with EPA's own precedents and none of the precedent cited by the Region/OAR is on point. In fact, as discussed in detail below, both the Clean Air Act and the EPA's implementing regulations expressly provide for enforcement of the CO_2 monitoring provisions under the Clean Air Act.

2. EPA Has Consistently Enforced the Carbon Dioxide Monitoring Requirement Under Section 113 of the Clean Air Act

Thanks to the EAB's initiative, the Region/OAR have provided the EAB and the other parties and amici with key documents from several proceedings in which EPA has enforced the CO_2 monitoring requirements of Section 821. As we describe in detail here, those documents show that EPA has consistently and uniformly relied on Section 113 of the Clean Air Act to enforce the CO_2 monitoring provisions of Section 821.

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[4] Despite conceding that CO_2 monitoring is enforceable under the Act, the Region/OAR continue to maintain, incorrectly, that Section 821 is not part of the Clean Air Act. But what is crucial for purposes of the Board's inquiry is that the Region/OAR agree that the Act can fairly be read to provide for enforcement of CO_2 monitoring under the enforcement provisions of the Clean Air Act.

In 1995, for example, the Agency sought – and obtained – monetary penalties against IES Utilities Inc. for failure to ensure continuous emissions monitoring ("CEM") of, among other things, carbon dioxide. *In re IES Utilities Inc.*, EPA Dkt. No. VII-95-CAA-111. Although the Region/OAR now describe the Agency's prior enforcement practices as "imprecise" (Region/OAR Supp. Response at 21), that is not so: in the *IES* case, EPA squarely invoked, again and again, the Clean Air Act's enforcement provisions in seeking penalties for failure to monitor CO_2 emissions. In other words, the EPA's enforcement effort in *IES* is consistent with the first reading discussed above – that CO_2 monitoring is enforceable under Section 113 of the Clean Air Act – but inconsistent with the notion of some separate, parallel enforcement authority under Section 821.

The Region/OAR seek to minimize the Agency's many past CO_2 enforcement actions under the Clean Air Act by suggesting that because there were several types of emissions at issue (*e.g.*, SOx, NOx, and CO_2), the Agency did not take any position about whether the Clean Air Act itself can be used to enforce the CO_2 monitoring requirements. Region/OAR Supp. Response at 20-23. But that is not accurate. In the *IES Utilities* case, for example, EPA plainly sought to enforce the CO_2 monitoring provisions, but brought suit *only* under Section 113 of the Clean Air Act, *not* under Section 821. The first page of the Agency's civil administrative Complaint makes that clear:

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION VII
726 MINNESOTA AVENUE
KANSAS CITY, KANSAS 66101

BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	Docket No. VII-95-CAA-111
IES UTILITIES INC.	)	
Cedar Rapids, Iowa	)	COMPLAINT AND NOTICE OF
	)	OPPORTUNITY FOR HEARING
Respondent	)	

COMPLAINT

This civil administrative Complaint and Notice of Opportunity for Hearing under Section 113(d) of the Clean Air Act (the "Act"), 42 U.S.C. § 7413(d), proposes penalties for

As EPA explained in its *IES* complaint, the Continuous Emissions Monitoring regulations in Part 75 of the CFR specifically require measurement of CO_2 emissions:

> 8. 40 C.F.R. § 75.10(a)(3) provides, in relevant part, that the owner or operator for each affected unit shall determine CO_2 emissions by using the options specified in 40 C.F.R. § 75.10(a)(3)(i); 40 C.F.R. § 75.10(a)(3)(ii) or 40 C.F.R. § 75.10(a)(3)(iii).

EPA also made clear that the Clean Air Act itself – in particular, Section 412(e) of the Act – requires compliance with the CEM requirements (including, necessarily, the CO_2 monitoring requirements):

> 5. Section 412(e) of the Act, 42 U.S.C. § 7651k(e), makes it unlawful for the owner or operator of any source subject to Title IV of the Act to operate a source without complying with Section 412 and the implementing regulations at 40 C.F.R. Part 75, including 40 C.F.R. §§ 75.4 and 75.5.

EPA left no doubt that it was focusing on violations of the CO_2 monitoring requirements in particular, and not solely on SOx or NOx emissions:

> **16. As of January 1, 1995, Respondent had not completed the certification testing of required continuous emission monitors for carbon dioxide at Sixth Street units 4(7/8) and 5(9/10).**
>
> **17. As of January 1, 1995, Respondent had not completed the certification testing of required continuous emission monitors for carbon dioxide at Prairie Creek unit 3.**
>
> **18. As of January 1, 1995, Respondent had not completed the certification testing of required continuous emission monitors for carbon dioxide at Sutherland units 1, 2 and 3.**

When the respondents agreed to settle the *IES Utilities* case, the Consent Order signed by EPA reiterated that EPA was relying exclusively on Section 113 of the Clean Air Act, not on some murky parallel authority:

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION VII
726 MINNESOTA AVENUE
KANSAS CITY, KANSAS 66101

In the Matter of	)	
	)	
IES UTILITIES INC.	)	CAA Docket No. VII-95-CAA-111
Cedar Rapids, Iowa	)	
	)	
Respondent.	)	

CONSENT AGREEMENT AND CONSENT ORDER

This proceeding for the assessment of a civil penalty was initiated on or about June 19, 1995, pursuant to Section 113(d) of the Clean Air Act (hereinafter CAA), as amended, 42 U.S.C. § 7413(d), when the United States Environmental Protection Agency

Because of IES Utilities' violations of the Continuous Emissions Monitoring requirements applicable to CO_2 and other pollutants, EPA imposed a negotiated civil penalty of more than $100,000. *IES Utilities* Consent Agreement and Consent Order at 2-3.

The *IES* enforcement proceeding is one of several in which EPA has relied on Section 113 – not on some ill-defined scheme in some other statutory provision – to enforce the CO_2 monitoring requirements.

EPA's enforcement action in 2000 against Indiana Municipal Power likewise shows – with no "imprecision" at all – that EPA was relying solely on Section 113 of the Clean Air Act as the basis for seeking civil penalties for violation of the CO_2 monitoring requirements. Here is the caption of EPA's administrative complaint:

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

IN THE MATTER OF:	)	Docket No. CAA-5- 2000-0 16
	)	
Indiana Municipal Power	)	**Proceeding to Assess a**
Agency, Carmel, Indiana	)	**Civil Penalty under**
at its	)	**Section 113(d) of the**
Anderson Combustion Turbine	)	**Clean Air Act,**
Facility, Anderson, Indiana	)	**42 U.S.C. § 7413(d)**
and	)	
Richmond Combustion Turbine	)	
Facility, Richmond, Indiana,	)	
Respondent.		

Administrative Complaint

1. This is an administrative proceeding to assess a civil penalty under Section 113(d) of the Clean Air Act (the Act), 42 U.S.C. § 7413(d).

Consistent with its practice in other proceedings enforcing the CO_2 monitoring requirements, in its complaint in the *Indiana Municipal Power* case EPA treated Section 821 as part of the Clean Air Act:

> 5. Pursuant to Section 412 and 821 of the Act, 42 U.S.C. §§ 7401-7671q, as amended by Public Law 101-549 (November 15, 1990) the Administrator established requirements for the monitoring, record keeping, and reporting of sulfur dioxide, nitrogen oxide, and carbon dioxide emissions, volumetric flow, and opacity under the Acid Rain Program at 40 C.F.R. Part 75.

In the Consent Order in the *Indiana Municipal Power* case, EPA reiterated its view that Section 821 is part of the Clean Air Act:

> 2. On , EPA filed the complaint in this action against Respondent Indiana Municipal Power Agency. The complaint alleges that IMPA violated Sections 412 and 821 of the Act, 42 U.S.C. §§ 7401-7671q, and 40 C.F.R. Part 72 and 75 at its facilities in Anderson and Richmond.

EPA ultimately imposed a civil penalty of nearly $75,000 on the Indiana Municipal Power Agency for its violations of the CO_2 monitoring and other requirements. Exh. 1 to Region/OAR Supp. Response at 38.

In a third civil administrative enforcement action, against the City of Detroit, EPA yet again asserted that the Clean Air Act requires utilities to monitor their CO_2 emissions.

II. REGULATORY BACKGROUND

5. The Acid Rain Program, which implements the Acid Deposition Control provisions found in Subchapter IV-A of the Clean Air Act, 42 U.S.C. §§ 7651-7651o, is codified at 40 C.F.R. Parts 72 through 78. The Acid Rain Program sets forth permitting, operating, monitoring, certification, recordkeeping and reporting requirements for "affected units," as that term is defined under the program.

* * * * * *

7. The Acid Rain Program requires, among other things, that the owner or operator of an affected unit monitor, record and report sulfur dioxide (SO_2), nitrogen oxides (NOx) and carbon dioxide (CO_2) emissions, volumetric flow and opacity data.

EPA's complaint against Detroit specifically focused on the Clean Air Act regulations requiring monitoring of CO_2 emissions:

17. 40 C.F.R. § 60.45, requires that affected units install, calibrate, maintain and operate continuous emission monitoring systems for measuring NOx and CO_2 emissions.

And consistent with its uniform practice, in the 2004 *City of Detroit* proceeding, EPA again relied solely on Section 113 of the Clean Air Act as the statutory basis for seeking remedies for violation of the CO_2 monitoring requirements:

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

IN THE MATTER OF:	)	Docket No. CAA-05- 2004 002
	)	
City of Detroit,	)	Consent Agreement and Final
Department of Public	)	Order
Lighting	)	
Mistersky Power Station	)	
Detroit, Michigan	)	
	)	
Respondent.	)	

CONSENT AGREEMENT AND FINAL ORDER

I. JURISDICTIONAL AUTHORITY

1. This is a civil administrative action instituted pursuant to Section 113(d) of the Clean Air Act (CAA), 42 U.S.C. § 7413(d), and Sections 22.1(a)(2), 22.13(b), and 22.34 of the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits," 40 C.F.R. Part 22 (the Consolidated Rules).

In court, the Justice Department (as counsel for EPA) has likewise expressly relied on Section 113 of the Clean Air Act as the basis for enforcing the CO_2 monitoring provisions. The following is from the cover page of the 1998 federal district court complaint against Block Island Power Company:

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	Civil Action No.
BLOCK ISLAND POWER COMPANY, INC.,	)	CA 99 045 M
Defendant.	)	

COMPLAINT

The United States of America, by authority of the Attorney General of the United States and through the undersigned attorneys, acting at the request of the Administrator of the United States Environmental Protection Agency ("EPA"), files this complaint and alleges as follows:

Nature of Action

1. This is a civil action instituted pursuant to Section 113(b) of the Clean Air Act (the "Act"), 42 U.S.C. § 7413(b), in which the United States seeks civil penalties and injunctive relief for Block Island Power Company, Inc.'s

Even the DOJ's cover sheet for the lawsuit pointedly relied on the same authority:

IV. CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE
DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY)
The United States is seeking penalties and injunctive relief under Section 113(b) of the Clean Air Act, 42 U.S.C. § 7413(b).

In its lawsuit against Block Island Power, the United States treated the CO_2 monitoring requirements as part and parcel of the Clean Air Act strictures requiring affected units to measure various types of emissions:

> IV. Acid Deposition Control
>
> 29. Section 412 of the Act, 42 U.S.C. § 7651k, and 40 C.F.R. Part 75, require the owner or operator of a "new affected unit" regulated under Subchapter IV-A of the Act, 42 U.S.C. §§ 7651 to 7651o, relating to the reduction of acid rain, to install, certify, operate, and maintain continuous emission monitoring systems at each affected unit for sulfur dioxide, nitrogen oxides, opacity and carbon dioxide.

The Court ultimately imposed an (agreed) civil penalty of nearly $75,000 on the *Block Island* respondents for their violations of the CO_2 emissions monitoring requirements and other provisions of the Clean Air Act and implementing regulations. Exh. 1 to Region/OAR Supp. Response at 93.

In a fifth enforcement action, in 1996 EPA intervened in a citizen suit against Public Service Company of Colorado, based on EPA's enforcement authority under Section 113 of the Clean Air Act:

> WHEREAS, the United States moved under the Act without opposition to intervene in the Sierra Club's action as a party plaintiff pursuant to Sections 304(c) and 113(b) of the Act, 42 U.S.C. §§ 7604(c) and 7413(b), and file a complaint for Defendants' violations of: (1) the Colorado State Implementation Plan, Colorado Air Quality Control Act, §§ 25-7-1-I through 25-7-609, C.R.S. and its implementing regulations, 5 C.C.R. 1001-1 et seq.; (2) the NSPS, 40 C.F.R. § 60.11(d), promulgated under Section 111 of the Act, 42 U.S.C. § 7411; and (3) Defendants' emission permit;

Exh. 1 to Region/OAR Supp. Response at 122.

In the Consent Decree entered thereafter in the *Public Service Co.* lawsuit, EPA stipulated that the Court had jurisdiction over the subject matter of the Act *under Section 113*:

> III. JURISDICTION AND VENUE
>
> 3. This Court has jurisdiction over the Parties to and the subject matter of this action under Section 304 of the Act, 42 U.S.C. § 7604, the citizen suit provision of the Act, Section 113 of the Act, 42 U.S.C. § 7413, and under 28 U.S.C. §§ 1331, 1345, and 1355.

The Consent Decree required the *Public Service Co.* respondents to comply with emissions monitoring requirements for both CO_2 and other air pollutants:

> VI. CONTINUOUS EMISSION MONITORS
>
> 9. At all times after entry of this Decree, Defendants shall maintain, calibrate and operate CEMS for each unit of the Hayden Station to measure accurately SO(2) and NO(x) emissions from each such unit, as well as flow and carbon dioxide, in full compliance with the requirements found at 40 C.F.R. Part 75. Nothing herein shall preclude Defendants from installing, certifying and operating integrated CEMS equipment to measure SO(2), NO(x) or opacity, or any combination thereof.

Exh. 1 to Region/OAR Supp. Response at 132.

* * * * * * * * * * *

In short, across all of the enforcement proceedings that EPA has disclosed in its August 8 Supplemental Response, EPA has uniformly – and exclusively – relied on the Clean Air Act as the statutory basis for enforcing the CO_2 monitoring provisions. And that reliance is not the product of confusion or mistake: in a contemporaneous lawsuit, the EPA specifically preserved a jurisdictional objection over *another* provision of the 1990 Clean Air Act Amendments that was codified as a note to the Clean Air Act. *See infra* pp. 15-16.

3. The Region/OAR's Alternative Theory Is Inconsistent with the Agency's Uniform Past Practices

In a strained effort to avoid the Agency's long-standing interpretation of the law, the Region/OAR claim that Section 821 creates an enforcement regime that is a precise mirror image of that in the Clean Air Act, but is not part of the Act. Region/OAR Supp. Response at 11-19. This strained contention has no basis in the Agency's actual practices, is contradicted by the Act and the Agency's own regulations, and is not supported by the case law.

Though the Region/OAR devote many pages in their Supplemental Response to this novel theory, the EPA has never mentioned it before in its numerous enforcement actions spanning many years. To the contrary, as discussed above, EPA has consistently asserted that the CO_2 monitoring requirements are enforceable under the Clean Air Act itself.

Nor was the legal theory that EPA has now articulated – that provisions of the Clean Air Act Amendments codified as a "note" supposedly deserve lesser status – any secret at the time. Consider this: in late 1997 and early 1998, the United States and EPA signed a proposed Consent Decree enforcing the CO_2 monitoring requirements against Block Island Power Company, expressly under the authority of Section 113 of the Clean Air Act. Exh. 1 to Region/OAR Supp. Response at 86 ("This Court has jurisdiction over the subject matter of this action and the parties hereto pursuant to Section 113 (b) of the Act, 42 U. S. C. 7413(b) . . . ."); *see id.* at 112-13 (signature pages). The Court entered the Consent Decree on July 14, 1998. *Id.* at 112. Only two weeks later, the United States and EPA filed a brief in federal court reserving an argument that the court lacked jurisdiction to enforce another provision of the 1990 Clean Air Act Amendments that – like Section 821 – was codified in the U.S. Code as a note.[5] EPA was

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[5] Memorandum of Law in Support of EPA's Cross-Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment, *State of New York v. Browner*, Civ. No.

thus fully aware, at the time it enforced the CO_2 monitoring requirements under Section 113 of the Clean Air Act, of the option of arguing that codification as a note barred enforcing the monitoring requirements under the Clean Air Act. EPA's consistent practice in relying on Section 113 of the Clean Air Act in enforcing the CO_2 monitoring provisions is thus *not* the product of any "lack of clarity." And that consistent practice makes perfect sense, since unlike the other provision codified as a "note," EPA used authority under Section 821 to adopt a suite of regulations (in Part 75) under the Clean Air Act and also required in other regulations (in Part 71) that the CO_2 monitoring requirements adopted pursuant to Section 821 be enforced under the Act.

In any event, neither of the cases on which the Region/OAR rely in support of this novel theory – *Peabody* and *Navistar* – supports the Region/OAR's position here. *First*, unlike here, those cases addressed a wholesale incorporation of one statute by another. *See Director, Office of Workers' Compensation Programs v. Peabody Coal Co.*, 554 F.2d 310 (7th Cir. 1977); *United States v. Navistar International Transportation Corp.*, 152 F.3d 702 (7th Cir. 1998). *Second*, *Peabody* and *Navistar* simply discuss the *extent* to which a particular set of statutory procedures should be followed in enforcing another statutory provision. Neither case addresses, much less endorses, the key *qualitative* issue here: the Region/OAR's theory (at 18-19) that if a statutory provision refers to the enforcement procedures of another statutory provision, it thereby creates a parallel, but completely distinct, enforcement regime. *Third*, neither case arises under the circumstances of this one: a statutory provision codified as a note to the very same Act whose

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97-1028, at 7 n.4 (N.D.N.Y. filed July 27, 1998) (relevant portions to be filed by Petitioner). While the argument set forth by EPA in the *Browner* footnote is incorrect, the relevant point here is that EPA repeatedly chose to enforce the CO_2 monitoring provisions under the Clean Air Act even though it was aware of the position that statutory provisions codified as "notes" to the Act may not be so enforced.

enforcement procedures are to be applied. *Finally*, unlike in either *Peabody* or *Navistar*, here the agency (EPA) adopted regulations mandating enforcement of the (CO_2 monitoring) requirements under the relevant statute (the Clean Air Act). *See infra* pp. 17-18.

As discussed above, the enforcement documents filed by the Region/OAR with their Supplemental Response show that the Agency has consistently taken the position that the CO_2 monitoring provisions are enforceable under the Clean Air Act. Since the Region/OAR have conceded that this is a reasonable reading of the relevant statutory provisions, and have consistently taken this position over many years, the answer to the question the Board has posed is: yes, the CO_2 monitoring provisions are enforceable under the Clean Air Act.

In addition, as discussed in the next section, both the text of the Clean Air Act itself and EPA's own regulations leave no doubt that the CO_2 monitoring requirements are enforceable under the Clean Air Act.

4. Both the Act and EPA's Regulations Make Absolutely Clear That the CO_2 Monitoring Requirements Are Enforceable Under the Clean Air Act

Under Title V of the Clean Air Act, operating permits must include "applicable requirements of this chapter." *See* Clean Air Act § 504(a), 42 U.S.C. § 7661c(a); *see also* 42 U.S.C. § 7661a(b)(5)(A) (permitting authority must have authority to "assure compliance . . . with each applicable . . . requirement under this chapter"). EPA has defined the term "applicable requirements" in its regulations to include "[a]ny standard or other requirement of the acid rain program under . . . 40 CFR parts 72 through 78." 40 C.F.R. § 71.2. The CO_2 monitoring requirements are, of course, within Part 75 of the CFR, and thus constitute "applicable requirements."

Other EPA regulations list the "prohibited acts" that are subject to the Act's enforcement powers:

> "Violations of ***any applicable requirement***; any permit term or condition; any fee or filing requirement; any duty to allow or carry out inspection, entry, or monitoring activities; ***or any regulation or order issued by the permitting authority*** pursuant to this part are violations of the Act and ***are subject to full Federal enforcement authorities available under the Act.***"

40 C.F.R. § 71.12 (emphasis added).

As to Deseret, for which EPA is the permitting authority, the EPA's regulations requiring monitoring of CO_2 are both "applicable requirements" (as just discussed) and "regulation[s] . . . issued by the permitting authority." *Id.* Violations of those requirements and regulations are therefore "subject to full Federal enforcement authorities available under the Act." *Id.* And "the Act," in turn, is defined in the EPA's regulations as "the Clean Air Act." *See* 40 C.F.R. § 71.2 ("Act means the Clean Air Act, as amended, 42 U.S.C. 7401 et seq."). Thus, under EPA's own regulations, the CO_2 monitoring requirements are unambiguously enforceable under the Clean Air Act itself.

5. EPA's Long-Standing Practices Show That It Considers CO_2 a Pollutant Subject to Regulation Under the Act

In its Order seeking additional briefing, the Board asked the Region/OAR whether the CO_2 monitoring requirements are enforceable under the Clean Air Act. As discussed above, both the Region/OAR's concession in their supplemental brief, and the Agency's consistent practice across the enforcement proceedings disclosed in the Region/OAR's supplemental response, show that the answer to the Board's question is yes.

Faced with this inescapable reality, the Region/OAR try to belittle the significance of these concessions by asserting – while citing no precedent – that enforcement of the CO_2 requirements "under the Act" somehow "does not sweep either section 821 or the regulations implementing it into the Act." (Region/OAR Supp. Response at 19.) The Region/OAR carefully

avoid quoting the relevant statutory language, which is whether CO_2 is "subject to regulation under this Act." 42 U.S.C. § 7475(a)(4) (emphasis added).

The Region/OAR's reticence is not surprising: by the fact of pursuing enforcement proceedings about CO_2 emissions under the authority of the Clean Air Act, EPA has necessarily taken the position that CO_2 is "subject to regulation under" the Clean Air Act. In particular, EPA has used its authority under Section 113 of the Clean Air Act to obtain administrative penalty orders for hundreds of thousands of dollars, issue an "order requiring [a violator] to comply with [the CO_2] requirement or prohibition," and bring a civil lawsuit in federal court against the alleged violator. 42 U.S.C. § 7413(a)(3). By its terms, Section 113 itself applies only to violations related to State Implementation Plans and to violations of "any other requirement or prohibition of this subchapter, section 7603 of this title, subchapter IV–A, subchapter V, or subchapter VI of this chapter." *Id.* Through its own actions, therefore, EPA has shown that it recognizes that CO_2 is "subject to regulation under th[e] Act." Notably, the Region/OAR do not argue to the contrary; as discussed above, the Region/OAR avoid quoting the controlling statutory language in their supplemental brief. (Region/OAR Supp. Response at 20.)

6. Since Briefing Was Completed in this Case, EPA Has Approved a State Implementation Plan That Requires Not Only *Monitoring* of CO_2 Emissions But *Specific Limits* on CO_2 Emissions

As the Board is aware, the Region/OAR have argued in this proceeding that strict, mandatory monitoring of CO_2 emissions – as opposed to limits on emissions – does not make CO_2 "subject to regulation" under the Clean Air Act. The Region/OAR have also argued, as discussed above, that the CO_2 monitoring requirements are not regulation "under the [Clean Air] Act." For the reasons that Petitioners and many amici have previously explained, both of these positions are incorrect.

In any event, as the Region/OAR's September 9, 2008 filing discloses, the premise of that position is out of date: ***EPA has now approved and promulgated a Delaware state implementation plan revision that sets limits on CO_2 emissions.***

Specifically, in a Federal Register notice that became effective on May 29, 2008, EPA promulgated its approval of CO_2 emission standards, operating requirements, record keeping and reporting requirements, and emissions certification, compliance and enforcement obligations for new and existing stationary electric generators in Delaware. *See* 73 Fed. Reg. 23,101.

Critically, EPA approved emission standards for CO_2. The control requirements approved and promulgated by EPA included a CO_2 emission standard of 1900 lbs/MWh for existing distributed generators, 1900 lbs/MWh for new distributed generators installed on or after January 1, 2008, and 1,650 lb/MWh for new distributed generators installed on or after January 1, 2012. *See* Delaware Department of Natural Resources and Environmental Control (DNREC), Regulation No. 1144: Control of Stationary Generator Emissions, § 3.2; *see also* 73 Fed. Reg. at 23,102-103 (codifying approval in the Code of Federal Regulations at 40 C.F.R. § 52.420).

In EPA's proposed and final rulemaking notices, the Agency plainly stated that it was approving the SIP revision "under the Clean Air Act" (73 Fed. Reg. 11,845) and "in accordance with the Clean Air Act" (73 Fed. Reg. at 23,101). EPA's action in approving the SIP revision made the control requirements and obligations part of the "applicable implementation plan" enforceable under the Clean Air Act. *See* 42 U.S.C. § 7602(q).

Many Clean Air Act provisions authorize EPA enforcement of requirements and prohibitions under the "applicable implementation plan." *See, e.g.*, 42 U.S.C. § 7413(a)(1) (authorizing EPA Administrator to issue a compliance order, issue an administrative penalty, or bring civil action against the violating party); *id.* at (a)(2) (Administrator may enforce the

"applicable implementation plan" if states fail to do so); *id.* at (b)(1) (requiring the Administrator to commence a civil action or assess and recover a civil penalty against the owner or operator of a source or facility that violates an "applicable implementation plan"). In addition, EPA's action makes the emission standards and limitations enforceable by a citizen suit under section 304 of the Clean Air Act. 42 U.S.C. § 7604.

The Supreme Court has made clear that the requirements under an EPA-approved state implementation plan are federally-enforceable obligations under the Clean Air Act:

> The language of the Clean Air Act plainly states that EPA may bring an action for penalties or injunctive relief whenever a person is in violation of any requirement of an "applicable implementation plan." § 113(b)(2), 42 U.S.C. § 7413(b)(2) (1982 ed.). There can be little or no doubt that the existing SIP remains the "applicable implementation plan" even after the State has submitted a proposed revision.

General Motors Corp. v. United States, 496 U.S. 530, 540 (1990).

The Agency's recent approval of the Delaware SIP revision imposing limits on CO_2 emissions leaves no doubt that the proposed Bonanza coal-fired power plant must comply with the best available control technology for CO_2 – a pollutant that, even by EPA's own too-narrow definition, is subject to regulation under the Act. In their September 9, 2008 letter, the Region/OAR attempt to minimize the significance of this crucial development as follows: "Consistent with the arguments submitted on behalf of OAR and Region 8 in this proceeding, these offices do not believe that such action should influence the Board's decision in this case concerning a PSD permit *issued prior to April 29, 2008 in another jurisdiction.*" Region/OAR Sept. 9. 2008 Letter at 1 (emphasis added).

Although the Region/OAR do not elaborate, the statement just quoted suggests that the Board should ignore the Delaware SIP for two reasons: (a) the Region acted on Deseret's PSD permit application before the Delaware SIP was approved by EPA in 2008, and (b) the Delaware

SIP is relevant, for purposes of the PSD provisions of the Act, only in Delaware (or perhaps only in Region 3). Neither of those reasons provides any justification for the Board to ignore this important new EPA action.

As to the first issue, the Region/OAR offer no authority for the proposition that the Board must ignore legal developments that occur after the Region acts on a permit. It is settled law that, in reviewing the issuance of a permit, the Board "has the discretion to remand permit conditions for reconsideration in light of legal requirements that change before the permit becomes final agency action. " *In re J&L Specialty Prods. Corp.*, 5 E.A.D. 31, 66 (EAB 1994); *see also In re GSX Services of South Carolina, Inc.*, 4 E.A.D. 451, 465 (EAB 1992) (remand for consideration of impact of newly-promulgated rules). As the Board explained in ordering a remand in the *J&L* case, "[w]hile the Region may not have been aware" of the development when it made its decision, "we are now aware" that the development has occurred, making a remand the appropriate option. 5 E.A.D. at 66.

The Region/OAR's second contention – that the Delaware SIP is relevant (for PSD purposes) only in Delaware (or only in Region 3) – is based on a misreading of the Act. The central issue here is whether, in the language of Section 165(a)(4) of the Clean Air Act, CO_2 is a pollutant "subject to regulation under [the Clean Air] Act." 42 U.S.C § 7475(a)(4). This statutory test is simple, direct, and without qualification. The Region/OAR, however, seek to read into the statute a qualification that is not there, so that the provision would read: "subject to regulation under the Clean Air Act ***in the state (or Region) where the facility is to be constructed.***" But that is not what the Act says, nor do the Region/OAR offer any support for their contention that regulation of CO_2 in another part of the country does not count as "regulation." Under the plain language of Section 165(a)(4) of the Clean Air Act, if CO_2

emissions are restricted under the Clean Air Act, whether in one state or all 50, they are "subject to regulation under the Act" – even under the Region/OAR's improperly narrow definition of "regulation."[6]

Moreover, here it was EPA itself that issued the PSD permit, because the facility is to be located on tribal lands over which EPA has permitting authority. And it was also EPA that approved the Delaware SIP regulating CO_2 under the CAA. The permitting authority here – EPA – has thus squarely taken the position that CO_2 is regulated under the Clean Air Act, and any argument that the Delaware SIP is from another jurisdiction is irrelevant.

7. Since Briefing Was Completed, EPA Has Also Issued a Notice of Proposed Rulemaking Discussing Ways of Limiting the Impact of PSD Requirements Based on CO_2 Emissions

As the Board will also recall, Deseret and supporting amici have argued that a determination that CO_2 is regulated under the Clean Air Act will trigger a PSD permitting process for many relatively small entities. *E.g.*, Response Br. of Permittee Deseret Power Electric Cooperative (March 21, 2008) at 21-22.

The EAB need not resolve these policy issues to decide this proceeding; it is for EPA, in its rulemaking capacity, to address those issues. Indeed, the Region/OAR point out in their Supplemental Response (at 25-26) that the proposed Bonanza plant is unquestionably a "Major Stationary Source" and a "Major Emitting Facility" under the PSD provisions of the Clean Air Act. Nor is there any dispute that the Deseret/Bonanza plant would be a massive emitter of CO_2, in amounts exceeding, by orders of magnitude, the tons-per-year threshold specified in Section 169(1) of the Clean Air Act, 42 U.S.C. § 7479(1).

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[6] *See also Western States Petroleum Ass'n v. EPA* , 87 F.3d 280 (9th Cir. 1996) (criticizing EPA for applying different standards to different regions).

Since the conclusion of substantive briefing in this case, EPA has published a lengthy discussion of the policy options available to it to minimize potential concerns about application of the PSD requirement to small entities.[7] In particular, on July 30, 2008, EPA published in the Federal Register a lengthy notice about ways of regulating greenhouse gases under the existing Clean Air Act. Advance Notice of Proposed Rulemaking, Regulating Greenhouse Gas Emissions Under the Clean Air Act, 73 Fed. Reg. 44354 (July 30, 2008). EPA's notice includes extensive discussion of options available to EPA to limit the impact of the PSD requirement (as to CO_2) on smaller entities. *Id.* at 44503-44510 ("What Are Some Possible Tailoring Approaches to Address Administrative Concerns for GHG NSR?"). EPA's analysis of potential options confirms that concerns about administrability of the PSD program are for EPA in its rulemaking capacity, not for the EAB in adjudicating this matter. Whatever options EPA may choose to address concerns about smaller sources, it is clear that the Bonanza coal-fired power plant, projected to emit 1.8 million tons of CO_2 every year, would be subject to PSD requirements.

8. The Board Need Not and Should Not Seek to Resolve the Legal Issues Arising From the Definition of "Major Emitting Facility," Since All Parties Agree that the Proposed Bonanza Plant Is a "Major Emitting Facility" Under Any Definition

In its Order requesting supplemental briefing, the Board also asked about the Agency's regulation defining the term "major emitting facility," and in particular about the Agency's

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[7] The Board can take official notice of this Federal Register publication. *See In re Arecibo & Aguadilla Regional Wastewater Treatment Plants,* 12 E.A.D. 97, 145 n.86 (EAB 2005) ("The Board takes official notice of relevant non-record information contained in the [pertinent] judicial proceedings . . . . The Board generally regards public documents of this kind as appropriate for official notice.") (citations omitted); *In re City of Denison,* 4 E.A.D. 414, 419 n.8 (EAB 1992) ("The Order is not part of the administrative record in this proceeding, but it is an official government record subject to official notice."); *In re Hawaiian Commercial & Sugar Co.*, 4 E.A.D. 95, 102 n.13 (EAB 1992) (taking official notice of guidance document in PSD proceeding).

decision in 1977 to limit that term to facilities that emit regulated pollutants. Amici respectfully suggest that the Board need not and should not attempt to resolve that issue in this proceeding. As the Region/OAR acknowledge in their Supplemental Response, "[i]t is undisputed that the Deseret Bonanza facility is a 'major emitting facility' as defined in CAA § 169 and is a 'major stationary source' under the definition in the implementing regulations at 40 C.F.R. § 52.21(b)(1)(i)." Region/OAR Supp. Response at 25. Because there is no dispute about that issue in this proceeding, the well-established principle that tribunals should avoid resolving abstract issues strongly counsels against the Board's addressing this issue here. *See In re Caribbean Gulf Refining Corp.* (CARECO), 2 E.A.D. 107 (EAB 1985) ("By analogy, courts traditionally have been reluctant to review matters unless they arise in the context of a case or controversy which is ripe for judicial resolution."); *In re Midwest Steel Division, National Steel Corp.*, 3 E.A.D. 307 (1990) ("The issue will not be ripe for resolution until [the Region] attempts to apply [the condition at issue] (for example, in an enforcement action) in a manner contrary to [the party's] views on the subject."). Because the issue has not been raised by any party and is not in dispute, the Utah and Western Non-Governmental Organizations do not here address this complex issue of statutory construction, nor attempt to provide a point-by-point rebuttal of the Region/OAR's positions, many of which are controversial.[8] We respectfully suggest that the Board postpone resolution of these matters until it is presented with a case in which they are actually in dispute.

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[8] Amici's decision not to address this complex issue should not be understood as agreement with the Region/OAR's contentions about the issue. The Utah and Western Non-Governmental Organizations reserve the right to address this issue in any future proceeding in which it may be disputed.

CONCLUSION

The Region/OAR's Supplemental Response shows that EPA has for many years consistently policed the CO_2 monitoring requirements of Section 821 under the enforcement provisions of the Clean Air Act. Unable to dispute the Agency's own enforcement record, the Region/OAR correctly acknowledges that it is fair to conclude that the monitoring requirements are enforceable under the Clean Air Act, and in particular under Section 113 of the Act. That conclusion is also dictated by the plain language of the Clean Air Act and the regulations implementing it, including Sections 502(b)(5)(A) and 504(a) of the Act and Sections 71.2 and 71.12 of Title 40 of the Code of Federal Regulations.

The EPA's recent Advanced Notice of Potential Rulemaking shows that the Agency has begun the process of addressing policy questions about how to interpret the PSD requirements in a manner that will not impose unnecessary burdens on smaller entities. The Board need not resolve those issues in this proceeding about a massive industrial emitter.

Finally, as the Region/OAR have acknowledged in their September 9, 2009 filing, EPA has recently approved a State Implementation Plan that specifically limits CO_2 emissions. In doing so, EPA stated that it was acting "under the Clean Air Act" (73 Fed. Reg. 11,845) and "in accordance with the Clean Air Act" (73 Fed. Reg. at 23,101). Given the importance the Region/OAR have attached to the distinction between monitoring of emissions and quantitative limits on emissions, as well as to whether CO_2 is subject to regulation "under [the Clean Air] Act," EPA's approval of this SIP is an important development. Under the principles set forth in the *J&L* case, if the Board does not conclude that BACT requirements apply to CO_2 for other reasons, the Board should remand this proceeding to the Region for consideration of the impact

of EPA's decision to require control of CO_2 emissions under the Clean Air Act through the Delaware State Implementation Plan.

Respectfully submitted,

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September 12, 2008

CERTIFICATE OF SERVICE

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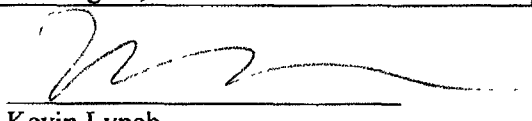

Kevin Lynch
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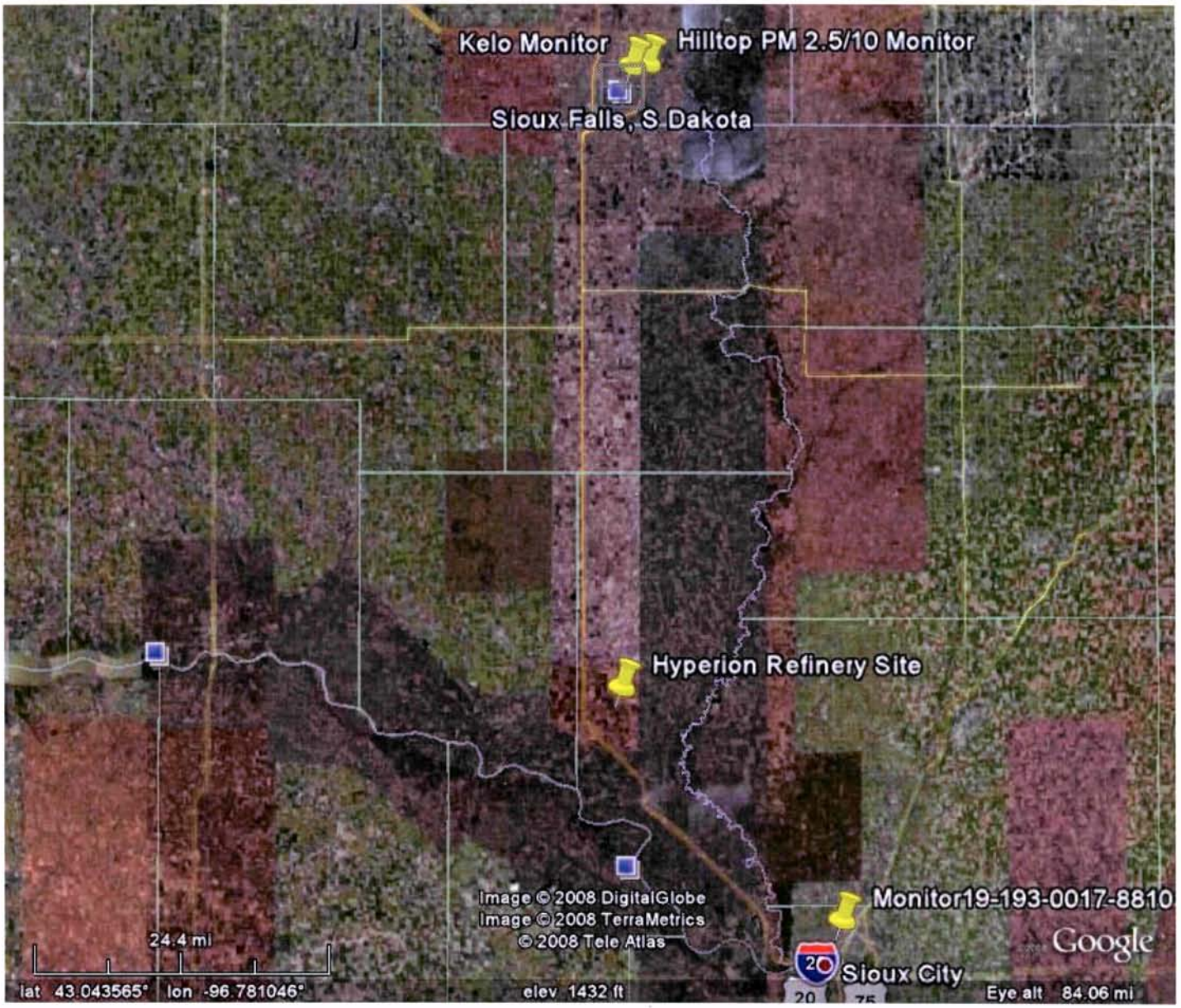
Attachment #3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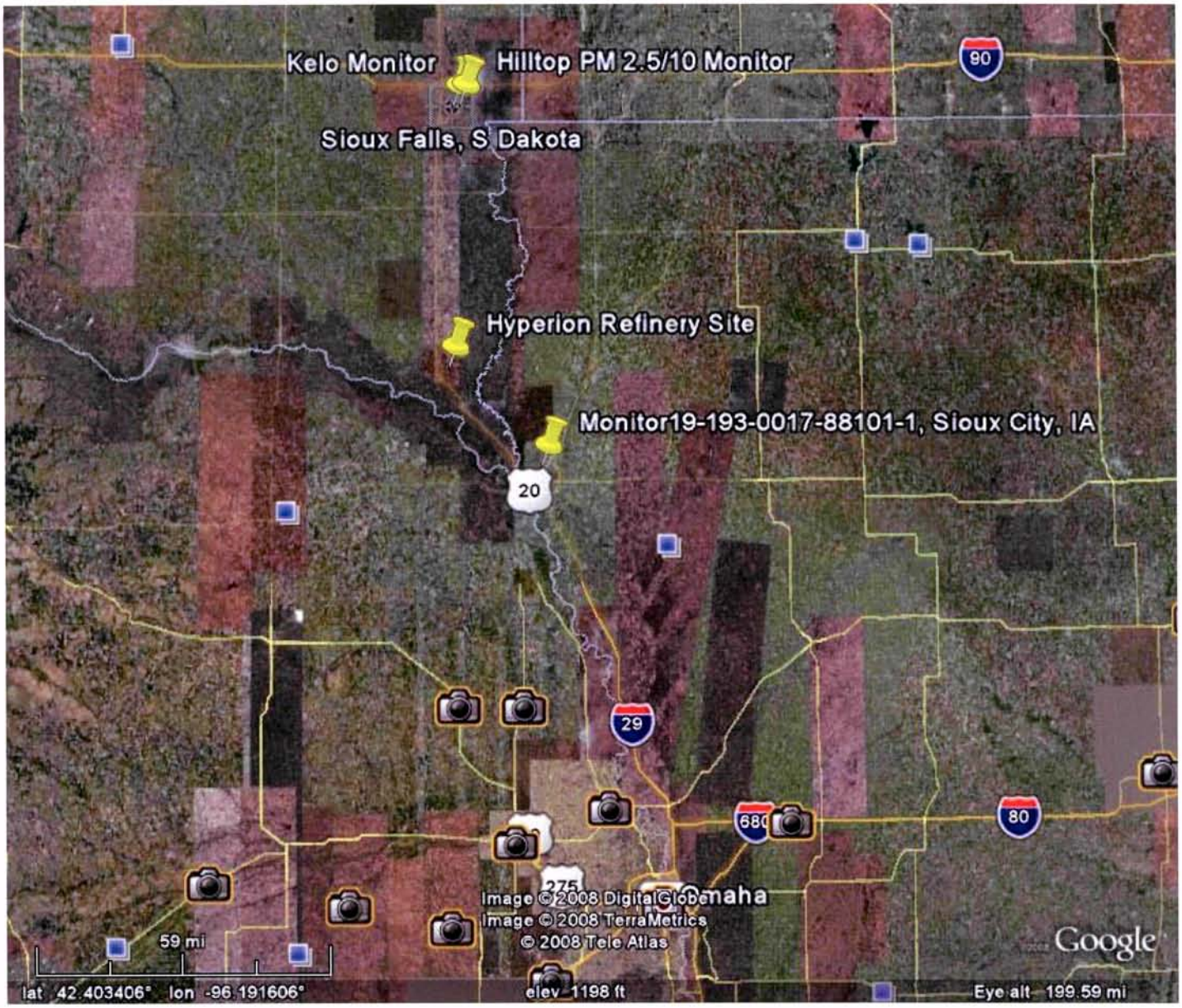
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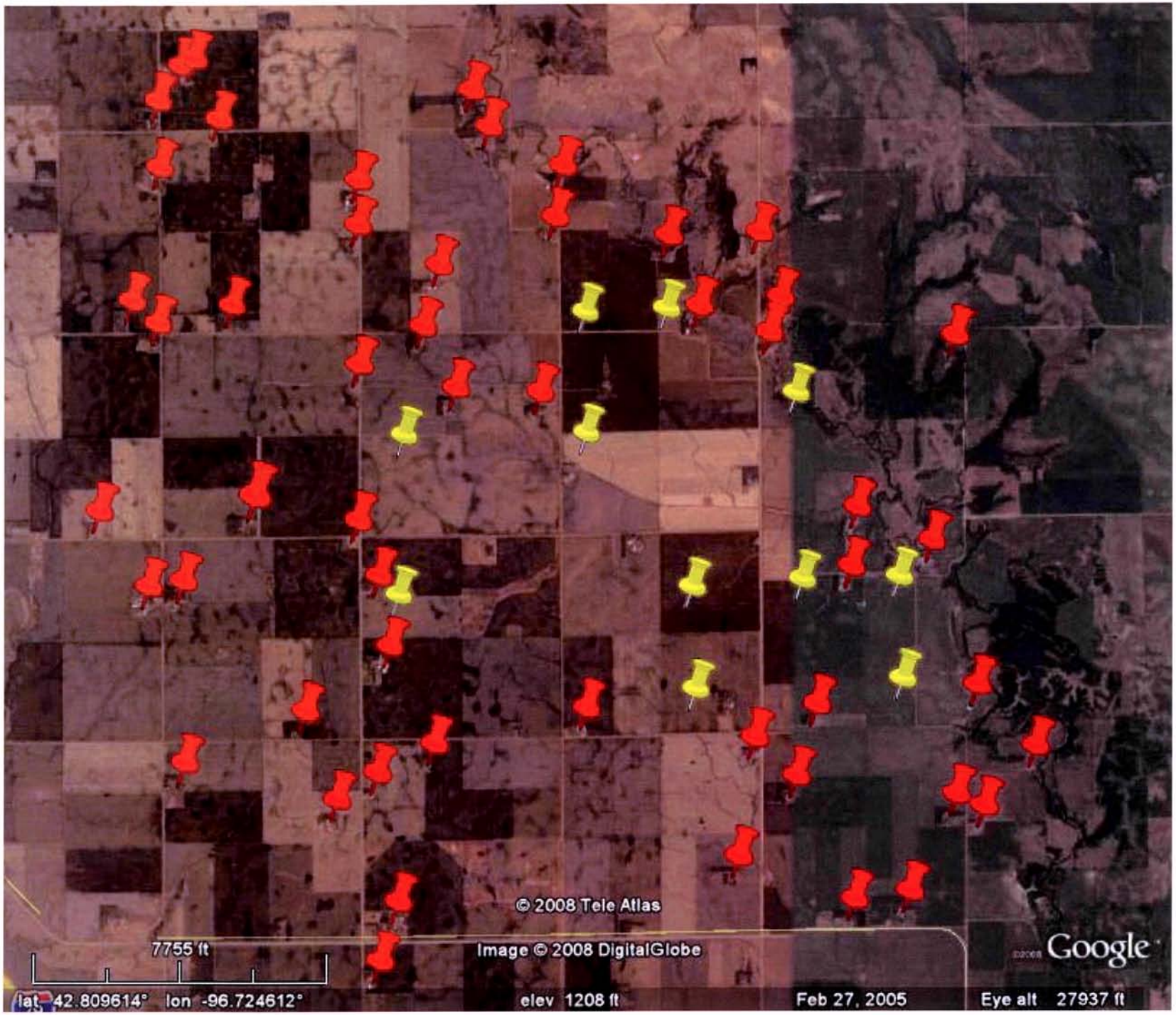
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